No. 89-204

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

E.R. SQUIBB & SONS, INC.,

Petitioner,

– against –

MINDY HYMOWITZ and ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

(For Continuation of Caption See Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT, ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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E.R. SQUIBB & SONS, INC.,

Petitioner,

– against –

ELIZABETH TIGUE, ET AL.,

Respondents.

E.R. SQUIBB & SONS, INC.,

Petitioner,

– against –

JANE DOLAN and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

QUESTION PRESENTED

Does a state statute which revives for one year otherwise time-barred toxic tort claims satisfy the requirements of due process and equal protection under the United States Constitution?

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Introduction

These actions challenge the constitutionality of Section 4, Ch. 682 of the Act of July 30, 1986, 1986 N.Y. Laws 1567.[1] The statute which became effective on July 30, 1986, revives for a period of one year, actions for personal injury, injury to property or death caused by the latent effects of exposure to diethylstilbestrol ("DES"), tungsten-carbide, asbestos, chlordane or polyvinyl-chloride, which were "barred as of the effective date of this act or which [were] dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired. . . ." 1986 N.Y. Laws, ch. 682, § 4.

Petitioner E.R. Squibb & Sons, Inc. ("Squibb") and cross-petitioner Eli Lilly & Company ("Lilly") (hereinafter "petitioners")[2] seek review of a judgment of the Court of Appeals of the State of New York, dated April 4, 1989 (75a),[3] which *inter alia*, unanimously upheld the revival statute as constitutional. Specifically, the Court held that revival of DES claims that had been barred as of the date of the act did not violate petitioners' rights under the Due Process or Equal Protection Clauses of the United States Constitution.[4] The Court limited its holding to

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[1] Petitioner and cross-petitioner also challenge the Court's adoption of a market share theory for determining liability and apportioning damages in DES cases. Respondent Attorney General of the State of New York intervened below solely in defense of the constitutionality of the revival statute, and addresses only that issue in this brief.

[2] Defendants below were Eli Lilly and Company, Abbott Laboratories, The Upjohn Company and E.R. Squibb & Sons, Inc. Only E.R. Squibb & Sons, Inc. and Eli Lilly and Company have petitioned for certiorari on the constitutionality of the revival statute.

[3] References to a number followed by the letter "a" refer to pages in the Appendix to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York. References prefixed "R.____" refer to pages in the Record on Appeal in the Court of Appeals.

[4] The Court also held that the revival statute was constitutional under the New York State Constitution. See discussion *infra* at p. 8.

DES claims because no producers of the other named substances or plaintiffs alleging injury therefrom were before the Court.

The petitions should be denied because revival of the barred DES claims was both reasonable and nonconfiscatory. Thus, revival of these claims did not result in a taking of petitioners' property without due process. Petitioners have also not been denied equal protection of the laws. It was rational for the Legislature to revive the barred DES claims, in order to correct for the past injustice to these claimants from the exposure rule statute of limitations, and it was rational to revive claims of only five substances, because these substances involved groups of victims who had been identified and whose injuries were known to be caused by ingestion or exposure to these substances, and because limiting revival to these substances ensured cost and insurance predictability.

STATEMENT OF THE CASE

A. *The Facts*

Respondent Mindy Hymowitz ("respondent") was born in New York City on December 11, 1954.[5] She first learned that she was a DES-exposed daughter in 1974 when a physician told her she had adenosis.[6] When she was 24 years old, in 1979, she was informed that she had developed clear cell adenocarcinoma, a malignancy.

As a result of the malignancy, respondent, at the age of 24, underwent surgery for removal of her uterus, cervix and most of her vagina. During surgery, a nerve was severed, causing her

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[5] In addition to Mindy Hymowitz, Elizabeth Tigue and Jane Dolan commenced actions against petitioners. The Attorney General intervened only in the case of Mindy Hymowitz.

[6] Adenois is the abnormal development or formation of gland tissue. Dorland's Illustrated Medical Dictionary, 26th ed. (1981).

to have permanent loss of bladder control. Because Mindy Hymowitz lived in New York State, she was barred from seeking compensation from those responsible for her injuries, for New York's statute of limitations provided that an action for personal injury had to be commenced within three years after exposure (N.Y. Civ. Prac. L. & R. § 214), subject to tolling. See N.Y. Civ. Prac. L. & R. § 208. Respondent's time to sue had run in 1975, approximately 4 years before she learned she had cancer. According to all her doctors, the injuries respondent sustained were due to DES exposure.[7]

B. *The Toxic Torts Act — Chapter 682 of the Laws of 1986*

For decades, New York's statute of limitations for actions for damages for personal injury or injury to property provided that subject to applicable tolling provisions, an action must be commenced within three years from the injury. CPLR § 214. Section 214 had been interpreted to mean that a cause of action accrues, without exception, from the date of "last exposure" to an allegedly harmful substance. *See Thornton v. Roosevelt Hospital*, 47 N.Y.2d 780 (1979); *Schwartz v. Heyden Newport Chemical Corporation*, 12 N.Y.2d 212, *cert. denied*, 374 U.S. 808 (1963). Thus, under that statute, plaintiffs had to commence an action within three years of last exposure or of reaching the age of majority, whether or not the effects of the harmful substance had appeared by that time.

To remedy this result, and to provide a remedy to people like Mindy Hymowitz, the Legislature, after many years of debate, passed the Toxic Torts Act, effective July 30, 1986. The act provides that notwithstanding section 214 (the "exposure" rule), the three year period within which to commence an action for injury caused by the latent effects of exposure to any substance shall be computed from the date of discovery of the injury by the plaintiff or from the date "when through the exercise of

[7] Her case was written up in 57 Ob. Gyn. 395 (1981) "Delayed Onset of Clear Cell Adenocarcinoma of the Vagina in DES-Exposed Progeny." (R.513).

reasonable diligence", such injury should have been discovered by plaintiff, whichever is earlier. N.Y. Civ. Prac. L. & R. § 214-c.

The revival portion of the Toxic Torts Act provides that notwithstanding other sections of the Act, if a person or property is injured as a result of the latent effects of exposure to DES, tungsten-carbide, asbestos, chlordane or polyvinyl-chloride, an action may be commenced within one year of the effective date of the statute [July 30, 1986] even if the action would have been barred as of the effective date of the act, or had been dismissed prior to the effective date of this act solely because the applicable period of limitations had expired. 1986 N.Y. Laws, ch. 682, § 4.

The Legislature's purpose in limiting the revival statute to these five substances is explained by the authoritative legislative history. Assemblyman Miller, a co-sponsor of the bill, stated during proceedings on the bill:

> The reason you have these five substances... is because these are the five groups of victims that we have been able to identify. These chemicals and in one instance a drug, because DES is a drug, all are drugs where we have been able to identify victims who have also been able to demonstrate that there has been a causal relationship either between ingestion or exposure and their injury (R.188).

He continued, that the five were picked "after consultations, broad consultations with the victims groups throughout the State of New York and these five substances represent the five substances that we can absolutely [sic] have a causal relationship to injury" (R.190).

And in the Senate, Senator Connor stated that the bill applied "specifically to a population for whom the census is pretty clear, the number of people involved are pretty clear" (R.203). He stated further that although the new section only revived claims for specific toxic substances "[t]here is certainly a possibility in the future of expanding the list" (R.203).

Senator Connor then went on to say that the legislature was only changing a statute of limitations — a procedural measure, not a substantive right, and therefore "there is nothing to prevent a future legislature from changing procedures even further, from perhaps going further and curing some of the shortfallings or shortcomings that may be in this bill as a result of compromise" (R.203-204).

The Attorney General of the State of New York agreed. In his Memorandum to the Governor, he advised that

> Ideally the revival would have applied to all victims regardless of the nature of the chemical to which they were exposed. The five chemicals enumerated do, however, cover the groups who are generally known to have been prejudiced under current law. As other groups are identified, it may be necessary to further amend the revival provisions of this bill (R.287).

The Governor in his memorandum approving the bill explained that the bill was intended to remedy past injustice in the state's statute of limitations for personal or property injury due to the latent effects of toxic substances.

> This measure . . . remedies a fundamental injustice in the laws of our State which has deprived persons suffering from exposure to toxic or harmful substances from having an opportunity to present their case in Court. That injustice results from an archaic rule which commences the three year time period for a suit on the date that exposure occurs. The rule fails to recognize that the adverse effects of many of these toxic substances do not manifest themselves until many years after the exposure takes place. In such cases, a person is barred from Court before he or she is aware of any injury.

* * *

> Most importantly, this measure remedies the injustices suffered by all of the currently known categories of victims of exposure to toxic or harmful substances. These include persons who have suffered serious injuries as a result of exposure to diethylstilbestrol (DES), tungsten – carbide, asbestos, chlordane or polyvinyl-chloride and have been deprived of access to the Courts because their claims were time barred. This bill revives their claims for a one year period and enables them to have their day in Court.

1986 N.Y. Legislative Annual 288.

C. *Prior Proceedings*

On or about April 7, 1987, respondent commenced the instant action, asserting two causes of action for negligence and strict liability, against various manufacturers of DES.[*] She claimed that the action was authorized by the revival statute, and requested compensatory damages of $10,000,000 and $10,000,000 in punitive damages. In their answers defendants claimed, *inter alia*, that the revival statute violated the due process and equal protection clauses of the federal and state constitutions and that the action was time barred. Respondent moved pursuant to CPLR 3211(b) to strike these affirmative defenses.

Defendants below, Lilly, Abbott, and Upjohn, cross-moved for summary judgment and dismissal of the complaint. Defendant Squibb opposed the motion, asserting *inter alia*, that respondent's motion should be deferred pending completion of discovery.

By decision and order entered July 21, 1987, the Supreme Court of the State of New York, New York County (Gammerman, J.) granted respondent's motion to strike the defendants'

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[*] Plaintiff commenced an action against defendants before the statute went into effect. By order dated June 25, 1987 and entered July 24, 1987, the Supreme Court permitted plaintiff to discontinue her first action without prejudice, and granted her leave, *nunc pro tunc*, to commence the second action.

affirmative defenses challenging the revival statute as unconstitutional on equal protection and due process grounds (54a), and denied defendants' cross-motions for summary judgment. *Id.*

The Appellate Division, First Department unanimously affirmed that order upon the decision of the trial judge on April 14, 1988. (35a). On May 24, 1988, the First Department granted defendants' motions for leave to appeal to the New York Court of Appeals.

In its opinion, dated April 4, 1989, the Court of Appeals, agreeing with the lower courts, unanimously upheld the revival statute as constitutional. (19a).

The Court disposed of petitioners' federal due process challenge, stating that "[t]he federal due process clause provides very little barrier to a state legislature's revival of time-barred actions (*see Chase Securities Corp. v. Donaldson*, 325 U.S. 304)" (19a). The Court concluded that, as in *Chase*, in which this Court upheld the revival of a time barred action, statutes of limitations "represent a public policy about the privilege to litigate . . . the history of pleas shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control (*id.* at 314)" (19a).

Moreover, the Court found the revival statute constitutional even under state law, which requires a more stringent level of review, the exceptional circumstances test (20a).

Applying that test, the Court held that because the latent nature of DES injuries is well known, and because in the past the exposure rule prevented the bringing of timely actions for recovery, exceptional circumstances are present and the revival statute which rectifies this injustice is thus constitutional. (20a).

The Court also held that the revival statute, as it pertains to DES, comports with equal protection guarantees, because it has a rational basis: the number of DES caused injuries, and the fact that DES victims were prejudiced by the prior law, was relatively well known by the Legislature, and this allowed for

the ramifications of revival of DES claims, such as the effect on insurance interests and other costs to be reasonably predicted (22a).

The Court concluded that these factors formed a proper basis for the Legislature's decision to revive DES claims now and to wait as to other substances, until they present a problem suitable for resolution. The Court relied upon the principle that equal protection guarantees are not violated by approaching piecemeal what may be a larger problem. (22a).

REASONS FOR DENYING THE WRIT

The petitions should be denied because petitioners have not demonstrated that the Court of Appeals' decision conflicts with any decisions of other state courts of last resort or of federal courts of appeal, or that their constitutional claims are of such public importance as to warrant review by this Court. Although the essence of petitioners' due process and equal protection arguments is that the revival statute violates their rights because it permits revival of those claims which could have been timely brought under the prior exposure-based limitations period and were not, they have not shown that there is a significant number of claimants in this category. Moreover, as will be demonstrated below, revival of the barred DES claims was both rational and nonconfiscatory, and thus, petitioners have not been denied due process or equal protection of the laws.

POINT I

THE REVIVAL STATUTE DOES NOT INTERFERE WITH PETITIONERS' PROTECTED PROPERTY, AND THUS, DOES NOT VIOLATE DUE PROCESS

Petitioner Squibb claims that it has been denied due process because the revival statute interferes with its protected property, to wit, its "distinct investment backed expectations". (Squibb Pet. p. 22). Put simply, Squibb contends that it has based its present and future business decisions, including decisions on insurance and litigation costs upon the expectation that DES

claims, barred as of the date of the revival statute, would no longer be viable.[9] Cross-petitioner Lilly, apparently raises the same claim. Lilly alleges that the prior statute of limitations vested Lilly with rights of repose upon which, under the due process clause, it could rely in making business judgments about insurance and management of litigation and other costs (Lilly Pet. p.10). Neither due process claim has merit.

In support of their claims, petitioners argue that *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), is no longer good law (Squibb Pet. p. 21-22; Lilly Pet. p. 10,n.8). They claim that the due process analysis of property rights set forth in *Chase Securities* does not survive this Court's "[m]odern just compensation analysis [which] identifies protected property by looking to whether state regulation has 'interfered with distinct investment-backed expectations'. (citation omitted)." (Squibb Pet. p. 22). There is no basis for this contention, and indeed, petitioners advance none.[10]

In fact, prior to *Chase Securities*, in the seminal case of *Campbell v. Holt*, 115 U.S. 620 (1885), and since *Chase Securities*, federal courts have consistently upheld state statutes reviving time-barred actions, based on the recognition that the expiration of a statute of limitations creates no "vested interest" in a

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[9] Although petitioner alleged a general "taking" claim below, its investment-backed expectations argument is a new theory never raised in any of the courts below. In all but exceptional circumstances, not present here, this Court has declined to address arguments not raised below. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

[10] Petitioners argue that the need for review is "highlighted" because two recent state court decisions have invalidated a revival statute similar to New York's. (Squibb Pet. p. 22). This argument must be flatly rejected because the two cases cited by petitioners, *Celotex Corp. v. St. Joseph Hospital*, 259 Ga. 108, 376 S.E.2d 880 (1989) and *Tyson v. Johns-Manville Sales Corp.*, 399 So.2d 263 (Ala. 1981), not only were decided on state constitutional grounds, but in reliance upon the state constitution provisions that *expressly prohibited* the revival statute in question. Clearly, therefore, those cases are inapplicable, because New York's Constitution does not prohibit revival of barred claims.

right not to be sued. *See IUE v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *In re "Agent Orange" Product Liability Litigation* ("Agent Orange"), 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 695 (1988). In light of these precedents which have consistently upheld revival legislation for more than one hundred years, petitioners' due process challenge must fail.

Even assuming petitioners had a protected property interest in the statute of limitations, revival of the barred DES claims does not constitute a compensable taking under the fourteenth amendment.

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), this Court identified three factors of particular significance in determining whether a taking in violation of due process has occurred: (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant and (3) the extent to which the regulation has interfered with distinct investment backed expectations. 438 U.S. at 124.

Examining the revival statute in light of these factors shows that the revival of the barred DES claims does not violate petitioners' rights to due process.

First, the revival statute is remedial in nature, and was enacted to remedy the manifestly unjust result of the exposure-based statute of limitations on the victims of exposure to DES. As such it promotes the health, safety and welfare of the State's citizens. *Penn Central Transportation Co.*, 438 U.S. at 124; *see also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

Second, although the revival statute may have an economic impact upon petitioners because of the increase in the number of claims, that alone is not unlawful. The revival statute merely gives claimants their day in court. It does not ensure their success on the merits of their claim.

Finally, the revival statute has not interfered with petitioners' investment-backed expectations. Petitioners themselves argue here as they did below, that the revival statute was the result of a political compromise reached after many years of debate. With all the years of debate, petitioners' claim that in making their business decisions, they did not consider the probability that they would have to litigate at least some revived claims, is incredible.

Similarly unavailing is petitioners' claim that under the *Chase* analysis, the revival statute imposes "special hardships" and "oppressive effects" on them. In rejecting this very argument, in *In re "Agent Orange", Product Liability Litigation* ("Agent Orange"), 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 695 (1988), a case involving the revival of agent orange claims, the district court found that the traditional purpose underlying a statute of limitations – preventing stale claims – was not frustrated by the revival statute:

> Staleness of claims is not a relevant issue in this litigation. Defendants have not lost evidence on their key defenses through the passage of time .... The availability of pertinent information, factual analyses and scientific studies has increased during the interim period facilitating the preparation of the case for all litigants. *Nor are defendants suddenly faced with the reinstigation of an action for which they are unprepared. Defendants have been aware, since not all claims were time-barred, that they would be litigating these issues at some point against some plaintiffs.*

597 F. Supp. at 812-813 (emphasis added).

The same is true of petitioners in this case. They will, in any event, be defending against a sizeable number of claims, many of considerable age, in those states with a discovery based limitations's period. As the trial court below held "loss of evidence over time is not of significance. Defendants have been litigating similar non-time barred DES cases for years." (51a).

In sum, although the revival legislation to some degree readjusts rights and burdens, petitioners have not demonstrated the substantiality of their claim that the readjustment violates their rights under the due process clause.

POINT II

REVIVAL OF THE BARRED DES CLAIMS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE THE CLASSIFICATION IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

Petitioners claim that the classification which (a) singles out DES and four other substances from all other toxic substances and (b) which revives claims arising from exposure to those substances, including claims which could have been timely brought under the prior exposure rule, is irrational, and thus violates their rights to equal protection. To the contrary, the Legislature's decision to proceed initially only with respect to DES and four other substances and to revive claims regardless of whether they might have been timely brought under the prior statute of limitations was reasonable, and thus comports with equal protection guarantees.

In the absence of a classification affecting fundamental rights or creating suspect classifications, equal protection requires only that the challenged classification be "rationally related to a legitimate governmental purpose (citations omitted)", *Kadrmas v. Dickinson Public Schools*, 108 S. Ct. 2481, 2487 (1988). Petitioners' implicit assumption that states must treat all manufacturers of every toxic substance in identical fashion is entirely unfounded. The "Equal Protection Clause does not require that a State . . . choose between attacking every aspect of a problem or not attacking the problem at all". *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). The fact that there are other known toxic or harmful substances which allegedly cause latent harmful effects does not render the classification arbitrary. Indeed, it is well established that reform may take "one step at a time, addressing itself to the phase of the problem which seems most

acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955). Thus, a statute is not unconstitutional because its classifications are imperfect, *Dandridge v. Williams*, 397 U.S. at 485, or are "not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

New York's Legislature determined that the exposure-based statute of limitations was unjust as applied to toxic tort claims because the injuries frequently did not appear before the time to commence an action had run. To remedy this injustice, the Legislature revived only claims related to substances which it believed directly caused the injuries. It also limited the revival to five substances in an effort to contain costs. The revival statute is thus rationally related to the legitimate state interest of remedying past injustice to victims of exposure to DES and four other toxic substances. Accordingly, the statute does not violate the equal protection clause.

Petitioners argue, however, that because the prior law did no injustice to those victims of DES exposure who could have brought a timely action, inclusion of these claims renders the statute irrational and therefore unconstitutional.

The revival of all barred DES claims is eminently reasonable. As the Court of Appeals found

> [s]ome plaintiffs may have known of their injuries a day, or a week, a month, or perhaps longer, before the original limitations period ran. Some may have known of their exposure, but did not develop injuries during the limitations period. Others may have known of some effect upon them of DES exposure, which became cancerous only after any action would have been time barred. (21a).

The Court thus correctly concluded that under the circumstances it was reasonable for the Legislature to revive all

DES claims uniformly for one year, rather than for the courts to "begin drawing arbitrary lines transecting this area's shades of gray." (21a). Thus there is no "special" or "important" reason for this Court to grant the petition or cross-petition.

CONCLUSION

For the foregoing reasons, the petition and cross-petition for a writ of certiorari should be denied.

Dated: New York, New York
September 28, 1989

Respectfully submitted,

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